SUBJECT INDEX

Page

Preliminary Statement 1

Argument 4

I

The Clean Air Act Creates No Judicial Remedy to Compel State Respondents to Adopt and Submit an Adequate Implementation Plan 4

II

No Cause of Action Exists to Compel State Respondents to Halt Construction or Operation of the Shopping Center 6

Conclusion 8

TABLE OF AUTHORITIES CITED

Cases	Page
A & H Transportation, Inc., Petition of, 319 F.2d 69 (4th Cir. 1963), cert. denied 375 U.S. 924 (1963)	6
Asherman v. Bales, 273 Cal.App.2d 707 (1969)	6, 7
City of Campbell v. Mosk, 197 Cal.App.2d 640 (1961)	7
McCarthy v. Watt, 89 F.Supp. 841 (D. Mass. 1950)	6
Miguel v. McCarl, 291 U.S. 442 (1934)	6
Morgan v. Null, 117 F.Supp. 11 (S.D. N.Y. 1953)	6
Moses v. Kennedy, 219 F.Supp. 762 (D. D.C. 1963)	6
New York Technical Institute of Maryland v. Limburgh, 87 F.Supp. 308 (D. Md. 1949)	6
O'Malley v. Chrysler Corporation, 160 F.2d 35 (7th Cir. 1947)	7
Riverside v. Ruckelshaus, 4 E.R.C. 1728 (C.D. Cal. 1972)	5
Shellburne v. New Castle County, 293 F.Supp. 237 (D. Del. 1968)	5
United States Servicemen's Fund v. Shands, 440 F. 2d 44 (4th Cir. 1971)	5
Wilson v. Sharp, 42 Cal.2d 675 (1954)	6

Federal Register	
38 Federal Register 31232 (November 12, 1973)	7
39 Federal Register 1025 (January 4, 1974)	7
39 Federal Register 1848 (January 15, 1974)	7

Miscellaneous	Page
88 Statutes at Large, p. 246	7
1974 United States Code Congressional and Administrative News, pp. 1163, 1675	7
Statutes	
Clean Air Act of 1970, Sec. 110	4
Clean Air Act of 1970, Sec. 110(c)	4
Clean Air Act of 1970, Sec. 304	2, 5
Energy Supply and Environmental Coordination Act of 1974, Sec. 4(b)	7
United States Code, Title 5, Secs. 701-06	5
United States Code, Title 28, Sec. 1361	5
United States Code, Title 42, Sec. 1857	1
United States Code, Title 42, Sec. 1857c-5	4
United States Code, Title 42, Sec. 15857c-5(a)(1)	3
United States Code, Title 42, Sec. 1857c-5(c)	4
United States Code, Title 42, Sec. 1857c-5(c)(3)	3
United States Code, Title 42, Sec. 1857h-2	2, 4, 5
United States Code, Title 42, Sec. 1857h-2(a)(1)	4
United States Code, Title 42, Sec. 1983	5

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-398

PLAN FOR ARCADIA, INC., a non-profit corp.,

Petitioner,

vs.

ANITA ASSOCIATES, SANTA ANITA CONSOLIDATED, INC., RUSSELL TRAIN, as Administrator, Environmental Protection Agency, RONALD REAGAN, Governor of the State of California, JOHN MAGA, Executive Officer, California Air Resources Board, ROBERT G. LUNCHE, Acting Air Pollution Control Officer for Los Angeles County Air Pollution Control District and CITY OF ARCADIA CITY COUNCIL,

Respondents.

Brief of Respondents Governor Reagan and Executive Officer Maga in Opposition to Petition for Writ of Certiorari

Preliminary Statement

Petitioner, Plan for Arcadia, Inc., commenced this action to enjoin further construction and operation by the non-governmental respondents of a regional shopping center in the City of Arcadia, State of California. Petitioner asserts that the shopping center is being constructed in violation of the Clean Air Act of 1970 (42 U.S.C. § 1857 *et seq.*) in that it constitutes a com-

plex source of air pollution which will prevent attainment and maintenance of federal ambient air quality standards.

Additionally, petitioner seeks mandamus relief against the Administrator of the Environmental Protection Agency, the Governor of the State of California, the Executive Officer of the California State Air Resources Board, the Los Angeles County Air Pollution Control Officer, and the Arcadia City Council.

This brief in opposition to the petition for writ of certiorari is submitted solely on behalf of respondents Ronald Reagan, Governor of the State of California, and John Maga, former Executive Officer of the California State Air Resources Board (hereinafter referred to as "state respondents").

In the proceedings below, the District Court held, and the Court of Appeals affirmed, that the exclusive authorization for bringing a private civil suit under the Clean Air Act is section 304 (42 U.S.C. § 1857h-2), and that petitioner had failed to state a cause of action thereunder. As both courts recognized, section 304 provides no right of injunctive relief against non-governmental parties except for violation of specific standards, limitations, or orders promulgated under the Act, and no right to mandamus relief against non-federal governmental officials for a failure to act. The only mandamus action authorized under section 304 is against the Administrator of the Environmental Protection Agency, and then only for failure to perform nondiscretionary acts or duties.

Plan for Arcadia, Inc. contends in its petition for writ of certiorari that because the State of California did not submit an acceptable implementation plan pur-

suant to 42 U.S.C. § 1857c-5(a)(1), and because the Administrator thereafter failed to adopt a plan on its own as required by 42 U.S.C. § 1857c-5(c)(3), petitioner may bring a private action for injunctive relief against the non-governmental respondents. (Petnr. Br., p. 13.)

As to state respondents, petitioner seeks a writ of mandate compelling state respondents to "adopt and submit to the Administrator a plan for implementation" in conformity with federal ambient air quality standards, and to "enjoin and restrain construction or operation of the shopping center and parking lots until such plan has been approved by the Administrator." [Cl. Tr. p. 14.]

It is respectfully submitted that, for the reasons set forth below, petitioner has no private right of action, either express or implied, under which it can compel state respondents to submit an implementation plan or require them to enjoin the non-governmental respondents from construction or operation of the shopping center.

ARGUMENT

I

The Clean Air Act Creates No Judicial Remedy to Compel State Respondents to Adopt and Submit an Adequate Implementation Plan

Petitioner's action is purportedly brought pursuant to section 304 of the Clean Air Act of 1970 (42 U.S.C. § 1857h-2), which authorizes private civil actions by "any person" against "any person . . . who is alleged to be in violation of an emission standard or limitation." 42 U.S.C § 1857h-2(a)(1).

Petitioner does not allege that state respondents were or are "in violation of an emission standard or limitation." Rather, as noted above, petitioner's purported cause of action against state respondents is that the State of California has failed to comply with section 110 of the Clean Air Act (42 U.S.C. § 1857c-5), which requires a state to adopt and submit to the Administrator "a plan for implementation, maintenance and enforcement" of national ambient air quality standards adopted by the Administrator. [Petnr. Br., p. 13, Cl. Tr. p. 11.]

State respondents readily concede that the Clean Air Act places initial responsibility upon the states for devising implementation plans. It is respectfully submitted, however, that the Act provides no judicial remedy to compel state respondents to adopt and submit such a plan. Rather, the Clean Air Act provides that the Administrator shall prepare, publish, and adopt on his own an implementation plan for any state that fails to adopt a plan, or that submits an unacceptable plan. Clean Air Act § 110(c); 42 U.S.C. § 1857c-5(c).

The public interest in enforcing the Clean Air Act is thereby safeguarded by investing the Administrator with the duty to "impose" an implementation plan upon a state in non-compliance with the Act. Should the Administrator, as petitioner alleges, fail to impose an implementation plan, a mandamus action may be brought to require promulgation. In fact, at the time petitioner filed this action, the Administrator was already acting pursuant to such a mandate. *See Riverside v. Ruckelshaus*, 4 E.R.C. 1728 (C.D. Cal. 1972).

It is clear, however, that no cause of action may be pleaded under section 304 for an order compelling a state to submit a plan, nor under any other statute or law cited by petitioner. Federal mandate provisions are applicable only against federal agencies and officials. 28 U.S.C. § 1361. The same is true of the federal Administrative Procedure Act. 5 U.S.C. §§ 701-06.

Petitioner cites two cases (Petnr. Br., App., p. 37) for the proposition that the court has jurisdiction to grant injunctive relief against state respondents. Neither case, however, is supportive of petitioner's position. Both *Shellburne v. New Castle County*, 293 F.Supp. 237 (D. Del. 1968), and *United States Servicemen's Fund v. Shands*, 440 F.2d 44 (4th Cir. 1971), involved the federal Civil Rights Act. However, that Act expressly provides that relief is available "in an action at law, in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. As noted, section 304 of the Clean Air Act (42 U.S.C. § 1857h-2) permits private actions only against persons creating emissions in excess of emission standards or limitations, or against the Administrator. It does not provide for equitable relief against non-federal governmental officials.

II

No Cause of Action Exists to Compel State Respondents to Halt Construction or Operation of the Shopping Center

Petitioner also seeks an order requiring state respondents to take action to halt construction and operation of the shopping center until an implementation plan for California is approved by the Administrator of the Environmental Protection Agency. [Cl. Tr. p. 14.]

What Plan for Arcadia, Inc. appears to request is a mandatory injunction requiring state respondents to institute legal proceedings against the non-governmental respondents. It is submitted that no cause of action exists to require a public official to institute such litigation.

A mandatory injunction is in effect equivalent to a writ of mandamus and is normally governed by like considerations. *Miguel v. McCarl,* 291 U.S. 442, 452 (1934); *McCarthy v. Watt,* 89 F.Supp. 841, 842 (D. Mass. 1950); *New York Technical Institute of Maryland v. Limburg,* 87 F.Supp. 308, 313 (D. Md. 1949).

In this regard, the courts have uniformly refused to issue writs of mandate to compel law enforcement agencies to institute prosecutorial activities for the reason that the decision to undertake prosecution is entirely within the discretion of the agency and not subject to control by way of mandamus. *Petition of A & H Transportation, Inc.,* 319 F.2d 69, 71 (4th Cir. 1963), *cert. denied* 375 U.S. 924 (1963); *Moses v. Kennedy,* 219 F.Supp. 762, 765-66 (D. D.C. 1963); *Morgan v. Null,* 117 F.Supp. 11, 15 (S.D. N.Y. 1953); *Wilson v. Sharp,* 42 Cal.2d 675, 678-79 (1954); *Ascherman v. Bales,* 273 Cal.App.2d 707,

708 (1969); *City of Campbell v. Mosk*, 197 Cal.App. 2d 640, 647 (1961).

It should also be noted that mandatory injunctions are rarely granted and only in a very urgent case where a clear entitlement to issuance is demonstrated. *O'Malley v. Chrysler Corporation*, 160 F.2d 35, 36 (7th Cir. 1947).

The present action, however, is not such a case. Plan for Arcadia, Inc. fails to indicate in its petition for writ of certiorari that the Administrator, having promulgated an implementation plan for California, including a regulation entitled "Management of Parking Supply," is now fully in compliance with the requirements of the Act. *See* 38 Fed. Reg. 31232 (November 12, 1973) as amended by 39 Fed. Reg. 1025 (January 4, 1974) and 39 Fed. Reg. 1848 (January 15, 1974). While the Administrator deferred the effective date of regulation until January 1, 1975, this suspension of the Clean Air Act timetable has been expressly authorized by Congress in section 4(b) of the Energy Supply and Environmental Coordination Act of 1974. 88 Stat. 246, 1974 U.S. Code Cong. and Admin. News 1663, 1675.

Thus, not only has the matter of compelling state respondents to submit an implementation plan become moot, but it would appear that in view of the authorization contained in section 4(b) of the Energy Supply and Environmental Coordination Act of 1974, state respondents are precluded by statute from bringing an action to enjoin construction or operation of the shopping center.

Conclusion

It is readily apparent that no cause of action exists as against state respondents. Rather, given the Administrator's promulgation of a California implementation plan, together with regulations governing projects of the nature involved herein, it is clear that the shopping center is being constructed and operated in full compliance with the requirements of the Clean Air Act.

For the foregoing reasons, state respondents respectfully urge this court to deny petitioner's request for writ of certiorari.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,
CARL BORONKAY,
Assistant Attorney General,
DAVID R. GOLDMAN,
Deputy Attorney General,
Attorneys for Respondents Ronald Reagan, Governor of the State of California and John Maga, Executive Officer, California Air Resources Board.